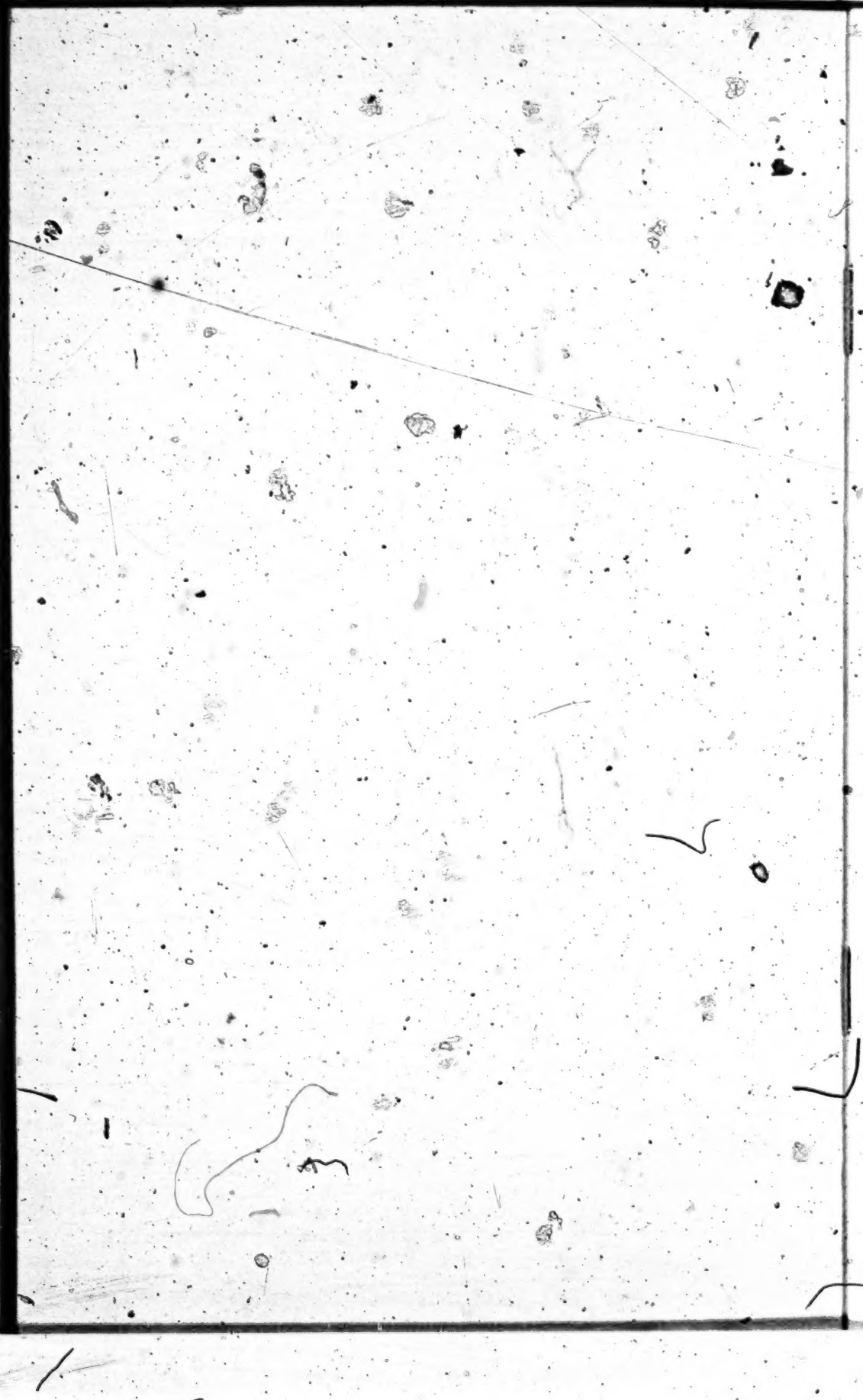

SUPREME COURT, U. S.
MOTION FILED
MAR 17 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, *et al,*
Respondents.

No. 71-1040

UNITED GAS PIPE LINE CO. AND PENNZOIL UNITED, INC.,
Petitioners,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

MOTION OF PIPELINE INTERVENORS FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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INDEX OF AUTHORITIES

	Page
CASES:	
California v. *Southern Pac. Co.*, 157 U.S. 229	7
Commonwealth Trust Co. v. *Smith*, 266 U.S. 152	9, 10
Hoe et al v. *Wilson*, 9 Wall. 501	3, 11
Mallow v. *Hinde*, 12 Wheat. 193	6
Minnesota v. *Northern Securities Co.*, 184 U.S. 199	3, 6, 8
Niles-Bement-Pond v. *Iron Moulder's Union*, 254 U.S. 77	7
Roos v. *Texas Co.*, 23 F.2d 171, *cert. den.* 277 U.S. 587	9
State of Texas v. *Interstate Commerce Commission*, 258 U.S. 158	7, 9
Williams v. *Bankhead*, 17 Wall. 563	8
STATUTES:	
Federal Rules of Civil Procedure (28 U.S.C. Rule 19(a))	2-3
National Gas Act (15 U.S.C. 717 *et seq.*)	6
MISCELLANEOUS:	
(Moore's) *Federal Practice*, Vol. 3A §§ 19.05, 19.07 (2d ed. 1970)	7

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Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Southern Natural Gas Company, Texas Eastern Transmission Corporation and Texas Gas Transmission Corporation (Pipeline Intervenors) respectfully move for leave to file the attached brief *amicus curiae* in this case. Pipeline Intervenors have previously filed a response in support of the petitions for writs of certiorari and motion for expedited consideration, which were granted by the Court on March 6, 1972. As indicated

by letters contemporaneously filed with such response, Texas Eastern Transmission Corporation obtained the consent of the Federal Power Commission (FPC) and United Gas Pipe Line Company (United) to the filing of an *amicus curiae* brief. No response was received from Louisiana Power & Light Company (LP&L) and we can only assume that it does not consent.[1]

Pipeline Intervenors own and operate major natural gas transmission systems through which gas is transported for ultimate distribution to millions of consumers in virtually every state east of the Mississippi River. United is a major supplier of gas to each of the Pipeline Intervenors. Since November 1, 1970, United has been curtailing deliveries to Pipeline Intervenors and to its other customers, including direct industrial customers such as LP&L. Pipeline Intervenors have a vital interest in the outcome of this case because the injunctive relief sought by LP&L would require United to increase its curtailment of deliveries to Pipeline Intervenors and other customers in order to supply the full requirements of LP&L.

It is the position of Pipeline Intervenors that the Court should reverse the decision of the United States Court of Appeals for the Fifth Circuit holding that the FPC has no curtailment jurisdiction over deliveries of natural gas transported in interstate commerce by an interstate pipeline company to direct industrial customers. However, assuming *arguendo* that this Court should agree with the Fifth Circuit on this point, the Fifth Circuit's decision still must be reversed because such decision, as was the District Court's, was rendered without the joinder of indispensable parties in accordance with Rule 19(a) of the Federal Rules of Civil

[1] In this connection, Pipeline Intervenors have been informed that LP&L refused to consent to the filling of an *amicus curiae* brief by Brooklyn Union Gas Company, which is a distribution company customer of Texas Eastern.

Procedure, 28 U.S.C. Rule 19(a). Because the question of indispensable parties has not been raised or briefed by any of the parties in the court below, we assume that it will not be presented in briefs filed by such parties before this Court. Moreover, it should be noted that this is a question that can and should be raised by this Court on its own motion. *Hoe et al* v. *Wilson,* 9 Wall. 501, 503-4, 19 L.Ed. 762-3 (1869); *Minnesota* v. *Northern Securities,* 184 U.S. 199, 235 (1902). If our argument on this point is accepted, then even if the Court should agree with the Fifth Circuit on the question of the Commission's jurisdiction under the Natural Gas Act, the Fifth Circuit's decision would still have to be reversed.

WHEREFORE, Pipeline Intervenors respectfully request leave to file a brief *amicus curiae* in this case on the issue of the absence of indispensable parties.

Respectfully submitted,

J. EVANS ATTWELL

Counsel for Texas Eastern Transmission Corporation

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BRIEF AMICUS CURIAE OF PIPELINE INTERVENORS

It is the primary position of Pipeline Intervenors that this Court should reverse the decision in *Louisiana Power & Light Company* v. *United Gas Pipe Line Company et al,* (No. 71-2550) where the Court of Appeals for the Fifth Circuit held that the Federal Power Commission (FPC) has no curtailment jurisdiction over deliveries of natural gas transported in interstate commerce by an interstate pipeline company to direct industrial customers such as Louisiana Power & Light Company (LP&L). Pipeline Intervenors believe that the reasons in support of their primary position will be adequately presented in the briefs filed by the FPC and United Gas Pipe Line Company

(United). However, in the event this Court should not overrule the limitation which the Fifth Circuit has imposed upon the FPC's curtailment authority under the Natural Gas Act, 15 U.S.C. 717 et seq., then for the reasons set forth below Pipeline Intervenors submit that the Fifth Circuit's decision still must be reversed because such decision, as was the District Court's, was rendered without the joinder of indispensable parties, i.e., Pipeline Intervenors and the other customers of United whose rights and interests would be seriously and permanently affected if the injunctive relief sought by LP&L were granted.

I.

As early as 1827 this Court recognized that no court can directly adjudicate upon the rights of persons without such persons being actually or constructively before it. *Mallow* v. *Hinde,* 12 Wheat. 193, 198. 6 L.Ed 599, 600(1827). This basic premise underlies the requirement that a court of equity must dismiss a complaint if the plaintiff fails to join all indispensable parties. Thus in *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199, 235 (1902) this Court stated:

> "The general rule in equity, is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the Court is enabled to make a complete decree between the parties to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a partial view only of the real merits.
>
> "The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter who are not

made parties to this suit, is founded upon clear reasons, and may be enforced by the Court, *sua sponte*, though not raised by the pleadings or suggested by the Counsel."

Therefore, the controlling question underlying the argument urged in this brief is whether Pipeline Intervenors and United's other customers are indispensable parties with respect to the injunctive action filed by LP&L. If so, their joinder is absolutely, not conditionally, necessary. *California* v. *Southern Pac. Co.*, 157 U.S. 229 (1894); *State of Texas* v. *Interstate Commerce Commission*, 258 U.S. 158 (1922). This is true even though certain of these customers cannot be joined without defeating LP&L's claim to federal jurisdiction predicated upon the diversity between LP&L and United and its parent, Pennzoil United, Inc.[1] (Moore's) *Federal Practice*, Vol. 3A §§ 19.05, 19.07 (2d ed. 1970).

2.

Although there is "no prescibed formula for determining in every case whether a person or corporation is an indispensable party or not",[2] the test most often cited and relied upon is set forth in *Shields* v. *Barrow*, 17 How. 129, 141 (1854) where this Court defined indispensable parties as:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

---

[1] LP&L is incorporated under the laws of the State of Florida and has its principal place of business in the State of Louisiana. United and Pennzoil are incorporated under the laws of the State of Delaware and have their principal place of business in the State of Texas. The joinder of Pipeline Intervenors would not defeat diversity jurisdiction because they are each incorporated under the laws of the State of Delaware and have their principal place of business in states other than Louisiana.

[2] *Niles-Bement-Pond Co.* v. *Iron Moulder's Union*, 254 U.S. 77, 80 (1920)

In other words, "where a person will be directly affected by a decree, he is an indispensable party . . .". *Williams* v. *Bankhead*, 19 Wall. 563, 571 (1874).

In the present case, the rights of Pipeline Intervenors and United's other customers will be directly and adversely affected by a decree granting the relief sought by LP&L. Since the limited supply of gas available to United is not sufficient to meet the requirements of all its customers, United has been required to allocate deliveries among such customers. The injunction sought by LP&L would require United to supply LP&L with substantially greater volumes of gas than United has heretofore supplied in accordance with curtailment plans on file with the FPC. It is readily apparent "that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter who were not made parties to [the] suit"[3] because in order to supply greater volumes of gas to LP&L, United would necessarily be required to increase its curtailment of deliveries to Pipeline Intervenors and its other customers.

Although LP&L may argue that the suit which it has filed only involves a contract dispute between United and LP&L alone, the controversy is not and cannot be limited to the gas requirements of LP&L but, of necessity, reaches and affects all of United's customers. This is true not only because of the actual impact of granting the injunctive relief sought by LP&L as discussed above, but also because the operation of the contract provisions[4] on which LP&L relies require a determination of the gas requirements of all of United's customers.

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[3] *Minnesota* v. *Northern Securities*, 184 U.S. at 235 (1902).

[4] These contract provisions entitled "Impairment of Deliveries" are printed in Appendix A hereto.

3.

Parties have been held to be indispensable because their "rights . . . are so entangled with one another that it is practically impossible in the decree to protect those who are absent[5]" and because the decree would be of "immediate concern" to them.[6] However, the case most squarely in point with the present fact situation is *Commonwealth Trust Co.* v. *Smith,* 266 U.S. 152 (1924) which involved a suit to foreclose a lien on water rights and lands two settlers had contracted to purchase. These water rights had been obtained by a private corporation from the State of Idaho and then had been sold to a multitude of settlers under separate contracts. At the time of the suit there was an insufficient supply of available water to satisfy the water-right contracts which had been entered into covering 73,000 acres. The defendants moved to dismiss claiming that the other holders of water-right contracts were necessary parties. The district court dismissed the action because of the plaintiff's refusal to join the other holders of water-right contracts, and its decision was upheld by the court of appeals. In affirming the lower courts, this Court noted, *inter alia*:

> ". . . as the bill was dismissed because of the refusal to bring in additional parties, the only question open here is whether the parties indicated were necessary parties. Of course they were, if they had such an interest in the matter in controversy that it could not be determined without either affecting that interest or leaving the interests of those who were before the court in a situation that might be embarrassing and inconsistent with equity. *Shields* v. *Barrow,* 17 How. 130, 139.

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[5] *Roos* v. *Texas Co.,* 23 F.2d 171, 173 (2nd Cir. 1927), *cert. den.* 277 U.S. 587 (1928).

[6] In *State of Texas* v. *Interstate Commerce Commission,* 258 U.S. 158 (1922) suit was brought by the State against the ICC to have its ruling on wages declared unconstitutional and employers and employees who were operating under the rulings were held indispensable because the decree would be of "immediate concern" to them.

"The plaintiff takes the position that the suit is simply one to foreclose a distinct lien on particular water rights and lands, in which the other holders of water-right contracts have no interest, and that a final decree determining the issues in the plaintiff's favor and granting the relief sought can neither affect the the other holders of such contracts nor work any embarrassment or inequity to the defendants. In our opinion that position is not tenable. The suit is much more than one for a simple foreclosure. The bill sets forth the controversy respecting the water supply and does so for the purpose of having it determined. The controversy is not peculiar to the contracts sued on but reaches and affects all that are outstanding. The contracts, while several in form, are interdependent in substance and operation. All are effectively tied together by the contract between the State and the company, in virtue of which they were made, and by what they purport to do, which is to entitle their holders to participate on equal terms in the use of a common supply of water and to invest them with proportionate interests in the works by which the water is collected and conducted to the places of use. As was well said by the District Judge,

> "'In a very substantial sense all the settlers are parties to one general contract, in the subject matter of which all are interested and by virtue of which all have rights so interdependent, whether they be regarded as joint or several, that the interest of one cannot be defined and adjudicated without affecting the interests of all others.' (266 U.S. at 159-60).
>
> * * * *
>
> ". . . In short, the interests of the contract holders are so related that an effective and just determination of the questions can only be had in a proceeding to which all are parties." (266 U.S. at 161).

Here, LP&L has a contract to purchase gas from United. So do Pipeline Intervenors and United's other customers.

But United does not have sufficient gas to meet all their contract requirements. Therefore, under the rationale of *Commonwealth Trust*, Pipeline Intervenors and United's other customers have such an interest in the matters at controversy in LP&L's suit, that it cannot be determined without either affecting their interest or leaving the interest of those who are before the Court in a situation that is embarrassing and inconsistent with equity. *Shields* v. *Barrow*, *supra*. The interest of all of United's customers are so closely related that an effective and just determination of the matters in controversy can only be had in a proceeding to which all customers are parties.

4.

The fact that the question of indispensable parties was not raised by the pleadings or suggested by counsel in the courts below is no impediment to the consideration of such question by this Court because the duty of a court to raise the question of indispensable parties on its own motion is well settled. Thus, in *Hoe et al* v. *Wilson*, 9 Wall. 501, 19 L.Ed. 762 (1869), Justice Swain said (9 Wall. at 503, 504, 19 L.Ed. 763):

> "But Zephania Jones, the Complainant in the suit in which the decree of sale was made, and the other heirs-at-law of Ann R. Dermott, are indispensable parties. No relief can be given in the case before us which will not seriously and permanently affect their rights and interests. According to the settled rules of equity jurisprudence the case cannot proceed without their presence before the Court. The objection was not taken by the defendant, but the Court should, *sua sponte*, have caused the bill to be properly amended, or have dismissed it, if the Amendment were not made. Instead of this being done, the cause was heard and decided upon its merits. This was manifest error."

CONCLUSION

For the foregoing reasons, Pipeline Intervenors urge this Court to overrule the Fifth Circuit and hold that the FPC has curtailment jurisdiction over deliveries of natural gas transported in interstate commerce by an interstate pipeline company to direct industrial customers such as LP&L. However, in the event that this Court should determine that the FPC has no such curtailment authority, then Pipeline Intervenors urge the Court to reverse the Fifth Circuit's decision for the reasons which are set forth in this brief.

Respectfully submitted,

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APPENDIX A

Excerpts from Contracts Between United Gas Pipe Line Company and Louisiana Power & Light Company

A. Agreement dated February 20, 1956 covering gas for the Sterlington Station:

"Article IX

"Impairment of Deliveries.

"In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers and public utility power plants using gas for generation of electricity which is sold to domestic consumers shall first be supplied by Seller, and the remaining available gas shall be prorated by Seller among its other consumers."

B. Agreement dated May 6, 1968 covering gas for the Nine Mile Point Station:

"Article IX

"Impairment of Deliveries

"Buyer specifically recognizes the fact that Seller delivers gas to gas utilities for resale to domestic consumers and to public utility power plants for generation of electricity which is sold to domestic consumers and to other industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all its consumers, when it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Seller and next the gas requirements of public utility power plants (including plant of Buyer) using gas for generation of electricity which is sold to domestic consumers, shall be supplied, and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. The remaining available gas supply shall be prorated by Seller among its other consumers."